# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

BALTIMORE AND OHIO RAILROAD COMPANY, appellant,
*v.*
THE UNITED STATES.
No 305.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF ON BEHALF OF THE UNITED STATES.

### STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial.

The claim was for $27,117.25, expended for labor and material in connection with remodeling an old shed owned by the claimant at Locust Point, Md., for a barracks for soldiers stationed at that place to guard property of the United States and the claimant company. The work was not requested by the Army officers, and nothing was said about compensation until after the work had been completed (p. 12). The claim was presented to the War Department Claims Board under the Dent Act, 40 Stat. 1272, which held that no contract, express or implied, ob-

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ligating the United States had been established, and the board's decision was approved by the Secretary of War (p. 14).

From the findings the following facts appear:

In September, 1917, Lieut. Col. Amos W. Kimball was ordered to Baltimore to establish an expeditionary depot. He visited Mr. Willard, president of the Baltimore & Ohio Railroad Co., and arranged a lease of Pier No. 6, at Locust Point, a suburb of Baltimore on the Chesapeake Bay. The railroad company owned eight piers at Locust Point, and these piers and the property on and around them were guarded at that time by civilian railroad employees. (Second finding, pp. 9 and 10.)

On October 30, 1917, a fire, supposed to be of incendiary origin, destroyed Pier No. 9, damaged Pier No. 8, and destroyed much other property belonging to the railroad company. Pier No. 9 was rebuilt and Pier No. 8 was repaired early in January, 1918, and both piers were leased by the Government prior to January 10, 1918. The day after the fire Colonel Kimball reported it to Washington by telephone and requested that a guard be sent to Locust Point immediately. On the same day he visited the acting president of the railroad company, told him of his request for a military guard, and learned that Mr. Willard, the president of the company, who was at that time head of the committee on national defense, had already requested the Secretary of War to furnish a guard.

Mr. Thompson, the acting president of the railroad company, offered to furnish a wrecking train, with a kitchen, plenty of bunks for the men, and a car for the officers, as quarters for the guard. (Third finding, p. 10.)

On November 3, 1917, the officer in command of the coast defense of Baltimore at Fort Howard received orders to send at once two companies of Coast Artillery of the Maryland National Guard, which had been mustered into the United States service, to Baltimore, one company to Locust Point, and one to Canton, across the river, and to get in touch with Colonel Kimball, who would advise as to their duties. The order was for the troops to have sufficient tentage, and it was carried. The troops were sent in accordance with the order. (Fourth finding, p. 10.)

The troops, numbering about 150 men, were quartered in the wrecking train that had been placed in the Baltimore & Ohio Railroad yard at Locust Point, and it was arranged that part should guard the pier at Canton and part the pier and property at Locust Point. The primary duty of the troops was to protect Government property, but generally to guard the whole water front, and the piers and all the property at that place. The company also maintained civilian guards and a fire department. (Fifth finding, p. 11.)

The troops were quartered on the wrecking train until November 9, when use of the train became

necessary for some railroad purpose, and it was moved away by the company. The troops then moved into tents. The weather during the fall and winter of 1917–18 was very cold. The soldiers were for the most part Baltimoreans, and their parents and relatives visited them frequently. There was some sickness among them, and their relatives complained to the railroad officials of the hardships that the soldiers had to undergo living in tents. The railroad officials were anxious to make them as comfortable as possible.

There was a transfer shed and platform near Pier No. 6 on land belonging to the company and not leased to the Government, built by the railroad company about 30 years before, and which had not been used for several years. It was in sound condition, however. The agent of the company in charge at Locust Point was William T. Moore, a member of an advisory committee whose duty was to confer with Colonel Kimball on railroad matters. Mr. Moore and Colonel Kimball met frequently, and on several occasions when the weather was very cold Colonel Kimball had remarked that the troops ought to have better quarters. Mr. Moore suggested fitting up the old unused transfer shed, and Colonel Kimball agreed that it would be a fine thing to make the men as comfortable as possible. Nothing was said about compensation nor did Colonel Kimball ask that this work be done. Mr. Moore afterwards saw the vice president of the company, Mr. Davis, about this matter, and Mr. Davis referred

him to Mr. Begien, general manager of the Baltimore & Ohio Eastern Lines. He saw Mr. Begien who, after talking with the chief engineer, directed Mr. Riley, the chief draftsman in the latter's office, to accompany Mr. Moore to Locust Point and look over the situation. They visited the place together, and the next day Mr. Riley took some measurements, made some pencil sketches and afterwards made blue-print plans for remodeling the sheds for barracks. The plans provided for closing the north end and east side of the shed, placing an extension on the west side with a lean-to, which more than doubled the capacity of the original shed, and a room for the officers to be built on the south end. The building was partitioned off into a mess hall, kitchen, guardroom, sleeping room with bunks for the men, and officers' rooms; and windows and doors were placed. The building was also fitted with light, heat, water, and toilet facilities. The blue print of the plans was shown to Major Edgar, to learn from him whether or not the plans, in his opinion, would satisfactorily house the troops. He did not undertake to approve the plans, but did suggest to Mr. Riley, who brought the plans to him, the amount of the facilities which would be required. Nothing was said to Major Edgar about the expense or compensation for the work. (Sixth finding, pp. 11 and 12.)

The work thus planned was begun in the early part of December, 1917, and completed on or about December 22. On that date the first company of

the guard moved in and on December 26 the second company moved in, and they continued to occupy the building until May, 1919. The piers were returned to the company in June, 1919.

No Government officials connected with the work at Locust Point in 1917 had any authority to order the construction of the temporary barracks in question, and no orders were given by them, or any of them, for the construction of such building. The subjects of compensation was not mentioned in any conversations between Army officers and railroad officials until over a week after the building had been completed, when Mr. Moore told Major Edgar that he thought the Government ought to reimburse him for some of his trouble in the matter. (Seventh finding, p. 12.)

On January 10, 1918, Colonel Kimball addressed a request to the Quartermaster General for four additional companies to protect the vast amount of Government property at Locust Point and Canton, and for immediate authority to construct two barrack buildings of the type recently constructed at the various cantonments. The matter was referred to The Adjutant General, who, on February 8, 1918, by endorsement, stated that "It is not the policy of the War Department to build a set of barracks for each and every guard. Companies will be quartered in tents where buildings are not available." (Eighth finding, p. 13.)

After the barracks made from the transfer shed were vacated, the bunks, plumbing, etc., were re-

moved, and later part of the buildings was used by steamship companies for different purposes, and the collector of internal revenue was allowed to establish a branch office in the building without rent. The building is still standing and partly occupied. The Canton Railroad Company, at a cost of about $5,000, provided comfortable accommodations for the guards sent over daily from Locust Point, and presented no claim therefor. (Ninth finding, p. 13.)

On June 27, 1919, a claim was presented to the War Department under the Dent Act for $44,678.98. This was amended on March 11, 1920, by reducing the amount claimed to $27,117.25. (Tenth finding, p. 13.) This claim was rejected by the War Department, as has been hereinbefore set forth.

ARGUMENT.

The Court of Claims found that upon these facts no contract, express or implied, had been established. The Dent Act, 40 Stat. 1272, so far as relevant, provides:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for dam-

> ages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law:" * * *

It will be observed that to recover under this act it must appear that there has been an "agreement," express or implied, entered into in good faith by an officer or agent acting under the "authority, direction, or instruction" of the Secretary of War or the President, and that expenditures have been made or obligations incurred "upon the faith of the same." The appellant does not claim any express contract, but contends that an implied agreement arose out of the negotiations between its agent, Mr. Moore, and Colonel Kimball. Colonel Kimball did not ask that the work be done. It was Mr. Moore who suggested fitting up the unused shed, and Colonel Kimball simply agreed that it would be a good thing to do. The weather was cold; some of the soldiers were sick; they came from Baltimore, near by; and their relatives visited them frequently. The sight of these soldiers just from civil life, living in tents in

cold weather, naturally was distressing to their relatives, who complained to the railroad officials, not to the officer commanding the troops. These soldiers had been quartered in a wrecking train voluntarily by the railroad company until the company required the train for other use, and thereafter they occupied tents. It is also to be remembered that, while their primary duty was to protect Government property, they were also protecting railroad property of great value. The negotiations between Mr. Moore and Colonel Kimball amounted to nothing more than a suggestion to Colonel Kimball, in one of their numerous conversations, with an expression by that officer of his agreement that "It would be a fine thing to make the men as comfortable as possible," and there was no suggestion that the Government should pay for the expense. Mr. Moore saw the vice president of the company, the vice president talked with the chief engineer, plans were drawn, and the work done. This seems to have been done wholly upon the initiative of the railroad officials, and there was nothing in the transaction to suggest that they were acting otherwise than voluntarily, inspired by the commendable motive of making comfortable the men who were guarding their property and who came from the city where the company had its principal offices. It seems to have been undertaken in the spirit of kindness and generosity, coupled with what was obviously practical expediency. There was no formal

approval of plans and specifications, no estimate of cost, and no intimation that the Government must pay. The troops were not unprovided for; the Government furnished tents, and, as stated by The Adjutant General, it was not the policy of the War Department to build barracks for each and every guard. While living in tents in cold weather seems a severity to those in civilian life, nevertheless it is not a strange thing for soldiers to do, nor is it, we think, regarded in the Army as extraordinary hardship. At any rate the alteration of the shed was not done at the request of the War Department. It is not claimed that there was any duress or commandeering of the shed, nor was there any emergency. The War Department was within easy telephonic communication with Locust Point, and no Government official at Locust Point had any authority to order the construction of temporary barracks, nor did any of them give such order. There could, therefore, have been no implied agreement entered into by any officer acting under the authority, direction, or instruction of the Secretary of War. It is not claimed that the Secretary of War, or anybody having authority to authorize such expenditures, had any knowledge of the transaction whatever. Mr. Willard, the president of the company, was in close touch with the Secretary of War, and also, undoubtedly, with the acting president and other officers of his own company, and it would have been the easiest thing in the world, had it been their intention to ask the

Government to pay for this work, to seek authority from the Secretary of War or some other official authorized to incur the expense. The War Department was not communicated with on the subject. As Chief Justice Campbell of the Court of Claims points out in his opinion, the Act of May 12, 1917, 40 Stat. 74, contains the provision:

> That hereafter no expenditure exceeding $5,000 shall be made upon any building or military post or grounds about the same without the approval of the Secretary of War, upon detailed estimates submitted to him.

And if that statute and the other statutes (Revised Statutes, section 1136; act February 27, 1877, 19 Stat. 242; act February 27, 1893, 27 Stat. 484; act June 25, 1910, 36 Stat. 721) do not in terms affect a structure such as that in question here, they at least indicate the policy that authority for expenditures shall be vested in a responsible head, who, generally speaking, was the Secretary of War. If there may be cases of emergency where an officer in order properly to care for his troops may incur unusual expense or expenses not formally authorized, it can not be the case where there is plenty of time before incurring the expense to ask for and receive the necessary authority. The limited authority of an Army officer is a matter of which all persons dealing with him must take notice, and there is nothing in the occurrences which took place in this case that relieved the appellant from the duty

of acting advisedly in making outlays if it expected the Government to make reimbursement.

Furthermore it is impossible to imagine that an officer of Colonel Kimball's rank would for a moment have done anything which he had the slightest idea would commit the Government to payment for this work without at least getting an estimate of the cost and communicating with some superior officer of the department. As Chief Justice Campbell says: "At no time was there a statement or suggestion that the expense of the structure was to be charged against the Government." The claim falls far short of satisfying the provisions of the Dent Act. Colonel Kimball did not act nor pretend to act under the authority of the Secretary of War, nor were the expenditures made upon the "faith of the same." The claim seems to have been a pure afterthought. No claim was made until after the passage of the Dent Act.

The rule with respect to implied promises to pay is well stated in the case of *La Fontaine* v. *Hayhurst*, 89 Me. 391, as follows:

> No binding promise to make compensasation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected and from the language or conduct of the other party under the circumstances had reason to expect such compensation from the other party.

In *Coleman* v. *United States*, 152 U. S. 96, 99, this court said:

> But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.

In *Railway Company* v. *Gaffney*, 65 Ohio St. 104, 116, the court said:

> The rule of evidence applicable to the proof of an implied contract is accurately stated in Abbott's Trial Evidence, 358, as follows: "In general there must be evidence that defendant requested plaintiff to render the service or assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous. The evidence usually consists in, first, an express request pertaining to the services, or second, circumstances justifying the inference that plaintiff, in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay."

The circumstances of this case show that it is wholly lacking in the elements necessary to establish an implied contract.

There was no request by any Government officer that the work be done.

There was no suggestion by anyone that pay was expected.

The act of the railroad company was apparently a spontaneous act of kindly generosity, so regarded by all concerned.

In the case of *Wood* v. *Ayres*, 39 Mich. 345, 351, the court said:

> Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground *more probable* than that of a promise of recompense, no promise will be implied. The contract connection is not established.

The judgment of the Court of Claims should be affirmed.

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MARCH, 1923.

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